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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHIA-CHIEH CHEN, et al., Plaintiffs and Appellants, v. SUMMITPOINTE HOMEOWNERS ASSN., et al., Defendants and Respondents.	H041464 (Santa Clara County Super. Ct. No. 112CV224278)

Plaintiffs Chia-Chieh Chen and Sherry Chen (the Chens) own a home in the Summitpointe development in Milpitas, California. In 2012, the Chens sued the Summitpointe Homeowners Association (HOA), its property management company, and nine individuals who represented the HOA in various capacities. The suit arose out of disputes over the Chens' efforts to remodel their home and landscape their yard and their interactions with the HOA and its representatives.

After five days of judicially-supervised settlement discussions, the parties entered into a settlement agreement that included both monetary and equitable relief. The parties agreed that the settlement judge would maintain jurisdiction over any dispute related to the settlement agreement. Among other things, the equitable relief included procedures for the submission and approval of the Chens' landscaping plan for their backyard and completion of the project. The first step of the process was for the parties to meet and determine the location of the Chens' rear property line, which abutted the HOA common

area. At that meeting, the parties discovered that the property line was closer to the Chens' house than anyone realized. The Chens subsequently filed a motion to impose a landscaping easement over the area that their proposed landscaping plan, which included the construction of a large deck, encroached onto the common area. The court found that the Chens are entitled to an easement and granted the Chens' motion, but limited the scope of the work that could be done on the easement to planting groundcover and bushes. The Court also ruled that the easement is personal to the Chens and does not run with the land. The Chens appeal.

The HOA contends the orders at issue are not appealable, citing four grounds. We agree with their contention that the orders are interlocutory. The Chens argue the orders are appealable under Code of Civil Procedure section 904.1, subdivision (a)(6) because they in effect grant injunctive relief. While the orders in effect operate as a permanent injunction, there is a split of authority on the question whether an interlocutory order granting permanent injunctive relief is appealable. We conclude the orders are appealable and even if they are not, exercise our discretion to treat the appeal as a petition for writ of mandate and reach the merits of the dispute. We conclude the trial court, in the exercise of its equitable role supervising the settlement agreement, did not abuse its discretion when it imposed a limited landscaping easement subject to the conditions that the Chens challenge in this appeal. We will therefore affirm the court's orders.

I. FACTS AND PROCEDURAL HISTORY

The Summitpointe development consists of over 80 homes on the Summitpointe Golf Club in Milpitas, California. The Chens purchased their home in Summitpointe in April 2008. The Chens' rear property line abuts HOA common areas on the hillside below the Chens' house. In 2009, the Chens started remodeling their house. The nature of that work is not clear from the record, but the HOA contends that during the construction, the Chens "placed excavated earth onto the Common Area" behind their

home. In 2011, the Chens had plans drawn up to landscape their front and back yards and wrote a letter to the HOA board describing their plans. It is unclear whether they submitted their landscaping plans to the HOA's architectural committee (Committee) at that time, although they did submit the plans to an officer and director of the HOA who was a Committee member.

A. Allegations of Complaint

The Chens filed this action in May 2012. The operative pleading is their first amended complaint (Complaint). The named defendants included the HOA, its property management company, and nine individuals who were the property manager, officers and directors of the HOA, or members of its architectural committee (hereafter jointly Defendants). The Complaint alleged Defendants "knowingly and deliberately" violated the Convenants, Conditions and Restrictions (CC&R's), "mismanaged the [HOA], . . . harassed [the Chens] and arbitrarily discriminated against [them] as homeowners and members of the [HOA]." It contained causes of action for violations of the CC&R's, breach of fiduciary duty, negligence, trespass, violation of the Unruh Act (Civil Code section 51 [unlawful discrimination based on race]), intentional infliction of emotional distress, negligent infliction of emotional distress, and declaratory relief. The Complaint alleges problems related to remodeling the Chens' house and deck, but does not contain any allegations regarding the landscaping of their yard.

B. Submission of Landscaping Plan in 2013

In April 2013, almost a year after filing this action, the Chens submitted their landscaping plans to the Committee. The Chens proposed dividing the area at issue into two sections. On the western side—which covers about 40 percent of the area—they proposed a three-tiered garden with two retaining walls between the tiers. They proposed a landing and a vegetable garden on the top tier (behind the first retaining wall); a landing and six fruit trees on the second tier (behind the second retaining wall); and a landing

with access to the common area on the bottom tier. On the eastern side—which covered approximately 60 percent of the area at issue—they proposed a "[d]eck at ground floor level" with pavers or patio tiles covering two-thirds of the deck surface and artificial grass on the remaining third. These plans appear to call for the removal of an existing wooden fence at the top of the Chens' yard, which the parties refer to as the "red fence."

In May 2013, the Committee rejected the Chens' submission "due to incomplete specifications and inconsistent elements within the design." About 10 days later, HOA president John Scheff met with Mr. Chen to discuss the Committee's rejection of the landscape plan. In an e-mail, Scheff documented the HOA's concerns about the concrete bag retaining wall "located on [the] property line," which he said had only been "temporarily approved" for use "during construction" and many considered "unsightly." Mr. Chen agreed to resubmit the landscaping plan with the additional information requested by the HOA. The record does not indicate whether that was done prior to the settlement.

C. Settlement and Terms of Settlement Agreement

The case was set for trial on February 3, 2014. On the first day of trial, the parties agreed to a settlement conference with Judge Diane Ritchie. After five days of negotiations,[1] the parties signed a written mutual release and settlement agreement (Agreement), effective February 7, 2014, which provided that Defendants' insurer would pay the Chens $150,000 and provided for equitable relief, which we will describe further below. (Unless otherwise stated, all further date references are to 2014.) The monetary and equitable relief settled only the claims for violation of the CC&R's, breach of fiduciary duty, negligence, and declaratory relief. But as part of the Agreement, the Chens agreed to dismiss their remaining claims in exchange for a mutual waiver of fees

[1] Since this case involves a settlement and post-settlement motions, there is no record on appeal of the parties' settlement discussions.

and costs. The Agreement provides that it is "a supervised settlement that will be executed through completion, if necessary under the guidance of [Judge] Ritchie upon a properly noticed motion pursuant to . . . Code of Civil Procedure § 664.6 . . . ." (All undesignated statutory references are to the Code of Civil Procedure.) The parties agreed that Judge Ritchie "will maintain jurisdiction over any breach or dispute related to" the Agreement and would preside over any disputes "as necessary for the parties to carry out the terms of this Agreement"; and that "disputes over approval of construction on Plaintiffs' property . . . shall be decided by Judge Ritchie pursuant to California law applicable to common interest developments."

The equitable relief in the Agreement included promises by both sides. The HOA agreed to revoke all violations and fines issued against the Chens and agreed that—aside from certain landscaping and drainage issues to be remedied in the landscaping plan—the Chens' property was not in violation of HOA rules. The HOA promised, among other things, to adopt a code of conduct for directors and committee members, to review and enhance its architectural rules to insure fair and equitable treatment of all applicants, to circulate proposed rule changes to HOA members, to comply with the CC&R's rules regarding entry onto the Chens' property, to cooperate with any investigation by any governmental entity into a setback dispute between the Chens and one of their neighbors, and to "work together in good faith" with the Chens to determine their rear property line. To that end, the parties agreed to meet on February 15 to determine the rear lot line.

The Agreement provided that if they could not agree on the lot line, either party could ask Judge Ritchie to appoint a professional to make that determination. The Agreement also provided that the Chens would seek HOA approval of "the tiered garden plan . . . submitted in 2013," and would remove or cover the retaining wall within 90 days as part of their landscaping plan. The Agreement set out procedures and time frames for the parties to follow in the approval process and provided that the landscaping

was to be completed in 180 days. The Agreement provided that each side would bear its own costs and attorney fees up to the time of settlement, but that the prevailing party would be entitled to costs and attorney fees in any action or proceeding pertaining to the Agreement.

D. Efforts to Comply with Settlement Agreement and Dispute Over Property Line

On February 15, Mr. Chen met with HOA president Scheff and HOA treasurer Gerald Lovelace at the Chens' property to determine the location of the Chens' rear property line. At that time, the structures behind the Chens' house included: (1) the red wooden fence, which ran from east to west at the top of their sloping yard, (2) a temporary wooden walkway parallel to and six to eight feet away from the fence, (3) seven or eight wooden steps on the west side between the fence and the walkway, (4) plastic drain pipes, and (5) the concrete bag retaining wall. Each of these structures was added by the Chens.[2] The rest of the area, having been "denuded" by the Chens, consisted of exposed dirt, rocks, and weeds. The men used ropes and poles to determine the location of the property line, which proved to be closer to the Chens' house than the parties previously thought. According to Scheff, the parties orally discussed the location of the property line during this meeting and Mr. Chen did not object to or disagree with the result. On March 5, the HOA's insurer paid the Chens $150,000.

The Chens did not submit their preliminary landscaping plans by March 9,[3] as required by the Agreement. On March 10, the Chens submitted their preliminary plans to

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[2] According to the HOA, the Chens did not obtain HOA approval before building any of these structures. The Chens dispute that assertion.

[3] Defendants contend the preliminary landscaping plan was due on March 7, 2014. But the Agreement requires that it be submitted "within thirty (30) days after the Effective Date" of the Agreement. The Agreement expressly provides that its effective date was February 7; 30 days after February 7 was March 9, not March 7.

the HOA's new property manager. They were the exact same plans the Chens had submitted in 2013. On March 20, the Committee sent the Chens a 3-page letter responding to their submission. The Committee objected to the plans primarily because they proposed using property that the parties had agreed, when they met on February 15, was in the common area that belongs to the HOA. The Committee stated, "Plan must be reduced in scope to owned land," and that it hoped its comments would help the Chens develop their final submission.

On April 7, the Chens submitted their "full landscaping plan," which was prepared by a design professional, to the Committee. The plan covered the area up to the actual property line and proposed planting one dwarf citrus tree. The Chens also disputed the location of the property line and reserved the right to have that issue resolved by Judge Ritchie. The Chens later described this plan as a "placeholder plan to demonstrate that" there is only enough room to plant one tree if they are confined to landscaping only the property they own.

E. The HOA's Motion to Enforce Settlement Agreement & the Chens' Motion to Declare an Easement

On April 11, the HOA filed a motion to enforce the settlement agreement. The HOA argued that the Chens violated the implied covenant of good faith and fair dealing in the Agreement by: (1) not submitting their preliminary plans by March 7, (2) submitting a final plan that did not consider HOA feedback, (3) failing to object to the property line determination until April 7, and (4) failing to submit plans that would actually be approved. The HOA argued it was implicit in the Agreement that the Chens' landscaping be limited to property they own; it complained that the Chens' preliminary plans did not comply with the Agreement because they proposed building in the common area and did not address drainage issues as required by the Agreement. The HOA asked the court to select an expert surveyor to resolve the property line issue and to order the

Chens to submit a revised plan that is confined to property they own and addresses the drainage issues. The HOA requested $2,520 in attorney fees and costs and $5,000 in sanctions to deter the Chens "from engaging in further stall tactics."

On April 15, the trial court ordered the parties to retain Accurate Land Solutions (Accurate) to survey the property and ordered each side to pay one half of the cost of the survey. The survey confirmed that the property line is in the location the parties identified when they met on February 15. The Chens do not dispute the results of the survey. On April 16, the Committee advised the Chens that their full plan had not been approved and invited them to resubmit the plan if it addressed certain questions.

On April 17, the Chens filed a motion to impose either a prescriptive or an equitable landscaping easement. They argued that regardless of where the property line is, they are entitled to an easement because they had detrimentally relied on representations by HOA representatives that the property line was in the area of the concrete bag retaining wall. In a declaration, Sherry Chen stated that the HOA's former property manager told her the old stone retaining wall was on her property, was deteriorating, and needed to be replaced. The Chens replaced the stone retaining wall in December 2009 or January 2010 with a new wall made of bags of concrete that had been watered down at a cost of $2,600. The Chens also relied on the Committee's May 2013 letter rejecting their landscaping plan, which stated, "Please . . . note that the existing concrete bags along the rear property line were approved on a temporary basis and that they must be removed upon approval of a landscaping plan,"[4] and Scheff's May 2013 e-mail, which stated that the concrete bags were on the Chens' property line.

Both sides opposed the other side's motion. In opposition to the Chens' motion, the Defendants argued that the Complaint did not plead any kind of easement claim, that

[4] The HOA contends the original retaining wall had to be installed because the Chens pushed soil from their remodeling project onto the common area.

one cannot claim an easement by filing a motion, that the easement claim is barred by the Civil Code section 1542 waiver in the settlement agreement, that the Chens are not entitled to either a prescriptive or an equitable easement, and that allowing the Chens to retain the existing structures they placed on the common area forces the HOA to violate the CC&R's and exposes it to litigation.

At the hearing on the motions on May 2, the Chens argued: "This is not an exclusive easement we're asking the court to render here because it is an easement that we admit is subject to all powers the HOA had before and will continue to have over this disputed area. They are going to be able to regulate what we do under our proposed easement."[5] The Chens asked the court to "[J]ust grant a landscaping easement that's non-exclusive and makes it subject to what the HOA regulations would apply to it." The trial court found that the settlement negotiations contemplated the property line extended well below the actual property line as determined by the surveyor. The court found that when they settled the case, both sides believed that the property line was near the retaining wall and that most of the disputed area was on the Chens' property.

The trial court ruled from the bench and granted the Chens a non-exclusive landscaping easement "because their rights to landscape were contemplated and discussed in the settlement agreement." The HOA's counsel asked the court to clarify the scope of the easement: "Are you talking about plants, trees? Are you talking about decks, another extension on their house?" The court responded, "I'm talking about plants and trees, especially vegetation that will help the back slope not to erode. And certainly what type of plant is within the discretion of the [HOA]." The court the said that an

[5] " '[A]n "exclusive easement" is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. [Citations.] No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention.' " (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1308.)

existing tree could remain but as "far as additional trees being planted, I'm not allowing additional trees to be planted." The HOA's counsel responded that the trees that were previously on the easement area were "all dead" because the Chens "didn't maintain them." The court ordered the Chens to submit new landscaping plans that addressed the issues raised by the HOA "other than where the property line is" by May 16, ordered the HOA to respond by May 30, and reserved jurisdiction to resolve further disputes regarding the landscaping plans. The court asked the Chens' counsel to prepare the written order and ordered the Chens to obtain a legal description of the easement from Accurate to attach to the order. Accurate completed the legal description of the easement on May 7. According to that description, the easement covers approximately 974 square feet of the common area.

F. The Proposed Orders Regarding the Easement and the Chens' Third Landscaping Plan

The Chens' counsel prepared a proposed order to which the HOA objected. Both sides sent e-mails to the court on May 9 setting forth their positions regarding the proposed order. The main points of contention were (1) whether the court's order limited landscaping on the easement "to green ground cover and bushes" and prohibited "trees or hardscape (i.e., walkways, stairs, fences, etc.) on any part of the easement"; (2) whether the easement runs with the land or is personal to the Chens; and (3) whether the eastern boundary of the easement depicted on Accurate's May 7 map was correct. The HOA's e-mail included its own proposed order.

On May 16, the Chens submitted a third landscaping proposal to the Committee. The proposal was very similar to the Chens' original proposal. It included the construction of a deck and other hardscape that extended beyond the property line onto the easement and proposed planting five fruit trees on the easement. On May 30, the Committee rejected the Chens' third plan, citing these reasons: (1) no trees or hardscape

(which includes the deck, staircase, retaining walls, and walkways) are allowed on the easement; (2) the eastern boundary line on the plans does not conform to the court's order; (3) the rear (southern) boundary line could not be confirmed because there are no marking stakes, and (4) failure to provide species names for the bushes and plants.

On June 13, the Chens rejected the HOA's interpretation of the court's order and said there was no point going forward until the trial court enters its final, written order on the motion. They asserted that at the May 2 hearing, "Judge Ritchie simply overruled the [HOA's] previous objections to the Chens' landscaping plans based on the fact that they extended beyond the surveyed property line. That was the only aspect of the submitted plan that the court ruled on."

In late July, the HOA's counsel sent the court an e-mail asking about the status of the written order. She told Judge Ritchie both sides had reviewed the reporter's transcript of the May 2 hearing but "disagree[d] as to the import" of what the court said at that hearing. She also requested a date on the court's ex parte calendar to facilitate obtaining the order. The Chens' counsel responded with an e-mail objecting to the HOA's proposed order.

The court filed its written order on August 7 (hereafter "August Order"), denying the HOA's motion to enforce the Agreement and granting the Chens' motion for a landscaping easement. The court granted the Chens "a non-exclusive landscaping easement between the recently surveyed rear property line on their property down the slope to the outside edge of the concrete bag retaining wall facing the . . . common area. This easement will not run with the land and is granted to the Chens alone." The court ordered that the easement be landscaped in accordance with the Agreement; that the Chens remedy landscaping issues listed in the Agreement, including problems with the drainage pipes and retaining wall; and that "the easement is limited to ground cover and bushes. [The Chens] cannot have trees or hardscape." The court agreed with the HOA

regarding the eastern boundary and attached a modified version of the surveyor's map that excluded the disputed area on that side.

The following day the Chens objected to the August Order. Since the parties had not yet agreed on a landscaping plan and the deadline for completing the project under the Agreement had passed, the court set the matter for a case status review hearing on August 29.

G. The Chens Request Reconsideration and the Court's Supplemental Order

In their status conference statement, the Chens objected to the orders that the easement does not run with the land and that limited landscaping on the easement to ground cover and bushes. They argued these orders go beyond what the parties had briefed in their motions, violate the letter and spirit of the Agreement, destroy the value of the easement, and "will devastate" the Chens' property value. The Chens asked the court to reconsider the August Order pursuant to section 1008. They asserted that the Agreement required the HOA to approve their 2013 landscaping plan and that many other homeowners have "trees and hardscape in the landscaped portions of the Common Area adjacent to their homes." Defendants argued the Chens' status conference statement was a procedurally improper motion for reconsideration and asked the court to strike it. They also responded to the request for reconsideration on the merits.

After both sides filed their status conference statements, the court continued the case status review hearing to September 5, asked the parties to provide a new schedule for completing the tasks called for in the Agreement, and posed a number of questions in an e-mail. The Chens responded to the court's questions via e-mail; the HOA responded in a pleading filed on September 4 that included its proposed schedule for completing the terms of the Agreement.

At the September 5 hearing, the court heard extensive argument from the Chens regarding the August Order, in effect granting the Chens' request for reconsideration. The Chens argued that each of the points they objected to in the August Order were not presented by the parties' motions or ruled on by the court and were instead based on misrepresentations by the HOA's counsel regarding the scope of the court's ruling from the bench. The HOA responded that the rules of court allow counsel to engage in debate over the content of proposed orders. Judge Ritchie said she had reviewed the Complaint because she "wanted to see, if the case had gone forward, what possible remedies could have been provided to the [Chens], and essentially, except for the money damages, virtually none of the changes that have allowed them to move forward on their house and their property would have been provided from a decision at all. [¶] So that was one of the huge reasons why the parties wanted to try to enter a settlement agreement. For the Chens, that resulted in both money and cooperation. Now it has had to be cooperation that is supervised by the Court." Judge Ritchie added, "it's necessary for both parties to cooperate" and she does not have the power "to grant the Chens ownership of a piece of property they simply do not own." At the end of the hearing, she asked the parties for supplemental briefing on the questions whether the easement should run with the land, whether the court can limit the Chens' use of the easement, and on the location of the eastern boundary of the easement. Both sides filed supplemental briefs.

The court entered a supplemental order on September 12 (September Order), granting "a non-exclusive landscaping easement" that "will not run with the land and is granted to Plaintiffs alone." The September Order (1) provided that the eastern boundary of the easement would extend in a direct, non-angled line from the Chens' property line; (2) directed the Chens to pay for Accurate to mark the easement boundaries with permanent metal stakes and to resurvey the disputed southeast corner of the easement; (3) ordered that the Chens would not be allowed to build outside their property line;

(4) reiterated that landscaping on the easement is limited to ground cover and bushes, and does not include hardscape or trees; (5) ordered the Chens to submit a new landscaping plan that is consistent with the Agreement and the court's orders by September 19; (6) directed the HOA to approve the red fence and gate, since these were accepted under the Agreement; and (7) ordered the HOA to respond to the new plan by September 26. The court said the landscaping plan must state what is to be done on both the Chens' property and the easement and must indicate whether the retaining wall is to be covered or removed. Assuming the new plan is approved by the HOA, the court ordered the Chens to complete construction by October 27 and remove all construction debris by November 10. The court reserved jurisdiction to resolve future disputes regarding the landscaping plan and set a hearing for October 10 to address any disputes that may arise with the new plan "to resolve them quickly." On September 19—the date their new landscaping plan was due—the Chens filed this appeal from the August Order and the September Order (sometimes jointly "Orders").

II. DISCUSSION

A. The Chens Fail to Provide Adequate Record Citations

As a threshold matter, we address the Chens' failure to adhere to appellate rules regarding citation to the record. Each and every statement in a brief concerning matters that are in the appellate record, whether factual or procedural, whether in the statement of facts, the procedural history, or the argument portion of the brief, must be supported by a citation to the appellate record. (Cal. Rules of Court, rule 8.204(a)(1)(C); all further rules citations are to the Rules of Court; *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 970; *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745 (*Myers*); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 (*Barringer*) [record citations in statement of facts do not cure failure to include record citations in argument portion of brief].) This requirement allows the reviewing court to

locate relevant portions of the record expeditiously. (*Myers*, at p. 745.) Although the Chens' opening brief contains record citations, it is replete with statements—in the introduction and in the combined statement of facts and procedural history—that are not supported by any citations to the record. Indeed, pages five through nine do not contain a single record citation.

When an appellate brief fails to refer to the record in connection with the points raised on appeal, the appellate court may treat those points as having been waived or forfeited. (*Barringer*, *supra*, 102 Cal.App.4th at p. 1239; *Alki Partner, LP v. DB Fund Services, LLC* (2106) 4 Cal.App.5th 574, 589-590; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-801 [several contentions waived because the appellant failed to provide record citations to demonstrate that he had raised those issues in the trial court].) The appellate court may also disregard unsupported contentions. (*Liberty National Enterprises, L.P. v. Chicago Title Insurance Co.* (2011) 194 Cal.App.4th 839, 846; *Dominguez v. Financial Indemnity Co*. (2010) 183 Cal.App.4th 388, 392, fn. 2;) or strike portions of the brief entirely (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 391). We have carefully reviewed the record in this case and where appropriate will disregard statements in the opening brief that are not supported by the record.

B. Appealability and Defendants' Motion to Dismiss the Appeal

Defendants have filed a motion to dismiss the appeal, citing four grounds. First, they contend the appeal must be dismissed because it is taken from non-appealable, interlocutory orders. They argue the August and September Orders are not appealable final judgements since they do not fully and finally adjudicate the rights of the parties; in fact, they ordered the parties to each perform additional steps required by the Agreement and to return for further proceedings before the court. Second, Defendants contend the Orders are not appealable as injunctions under section 904.1, subdivision (a)(6) because

they are not pendente lite orders that preserve the status quo. Third, Defendants argue the Chens do not have standing to appeal because the orders granting an easement are favorable to them. Fourth, Defendants assert the Chens waived the right to appeal when they accepted the benefits of the Agreement, specifically the $150,000 payment and the grant of an easement. This court deferred ruling on the Defendants' motion to dismiss and ordered it considered with the merits of the appeal. In their respondents' brief, Defendants repeat the first three arguments from their motion to dismiss.

The Chens argue the Orders are directly appealable under section 904.1, subdivision (a)(6) because they effectively grant injunctive relief.

1. The Orders Are Interlocutory

A reviewing court has jurisdiction over a direct appeal only when there is an appealable order or an appealable judgment. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*).) "The existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by . . . section 904.1. [Citations.]" (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126-127.)

California is governed by the "one final judgment" rule, which provides that interlocutory or interim orders are not appealable and are only reviewable on appeal from the final judgment. (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1292-1293 (*Doran*).) "Under the one final judgment rule, ' "an appeal may be taken only from the final judgment in an entire action." ' [Citations.] ' "The theory [behind the rule] is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." ' (*Griset*[, *supra*,] 25 Cal.4th 688, 697 . . . ; see also *Flanagan v. United States* (1984) 465 U.S. 259, 264 . . . [the one final judgment rule 'reduces the ability of litigants

to harass opponents and to clog the courts through a succession of costly and time-consuming appeals']; *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, fn. 9 [the rule ensures a complete record for the reviewing court, allows it to better craft its directions to the trial court, and reduces trial court uncertainty and delay].)" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756 (*Baycol*).) "The one final judgment rule is 'a fundamental principle of appellate practice' [citation], recognized and enforced in this state since the 19th century [citations]." (*Ibid.*)

Section 904.1 codifies the common law one final judgment rule. (*Baycol*, *supra*, 51 Cal.4th at p. 756.) Section 904.1 directs in subdivision (a)(1) that an appeal may be taken "[f]rom a judgment, except an interlocutory judgment." "[I]n its remaining subdivisions, [the statute] lists various specific additional appealable orders that stand as exceptions to the general rule." (*Baycol*, at p. 756, fn. 3.) Subdivisions (a)(8), (9), and (11) list three types of interlocutory judgments or orders that are made expressly appealable by section 904.1. None applies here.

It is the substance and effect of the court's judgment or order, and not its label or form that determines whether " 'the order is interlocutory and nonappealable, or final and appealable. [Citation.] If no issues in the action remain for further consideration, the decree is final and appealable. But if further judicial action is required for a final determination of the rights of the parties, the decree is interlocutory. [Citation.] The decree will not be appealable "unless it comes within the statutory classes of appealable interlocutory judgments." [Citations.]' " (*Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1251 (*Critzer*), quoting *Doran*, *supra*, 76 Cal.App.4th at p. 1293; see also *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205 (*Viejo Bancorp*).)

" 'A judgment is final "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." ' [Citations.]" (*Sullivan v. Delta Air Lines, Inc*. (1997) 15 Cal.4th

288, 304.) " 'As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' [Citations.]" (*Griset, supra*, 25 Cal.4th at pp. 698-699.)

Citing *Doran*, Defendants argue the appeal must be dismissed because the trial court denied Defendants' motion to enforce the Agreement and "has not made a final judgment in the case." A judgment enforcing a written settlement agreement pursuant to section 664.6 is appealable under section 904.1, subdivision (a) "[s]ince the intended substance and effect of the judgment is to finally dispose of the . . . action, ..." (*Viejo Bancorp, supra*, 217 Cal.App.3d at p. 205.) If the motion is granted, section 664.6 empowers the trial court to "enter judgment pursuant to the terms of the settlement" (§ 664.6) and that judgment is directly appealable. (See also *Critzer, supra*, 187 Cal.App.4th at p. 1252 [appellate court amended order *granting* motion to enforce settlement to include an appealable judgment to expedite appellate review].) On the other hand, an order *denying* a section 664.6 motion to enforce a settlement agreement, like the order here, is a nonappealable interlocutory ruling, since judgment has not been entered and there are issues left for consideration in the trial court. (*Walton v. Mueller* (2009) 180 Cal.App.4th 161, 167; *Doran, supra*, 76 Cal.App.4th at pp. 1293-1294 ["denial of the motion, rather than finally disposing of the action, expressly leaves it open"].) Although instructive, these authorities do not resolve the appealability question here since the Chens do not challenge the order denying Defendants' motion to enforce the Agreement. Instead, they challenge the orders granting them an equitable landscaping easement and limiting their use of the easement. The parties do not brief whether such an order is appealable.

In determining whether the Orders are appealable, we consider the court's role under the settlement agreement. The Agreement expressly provides that it is "a supervised settlement that will be executed through completion, if necessary, under the guidance of [Judge] Ritchie upon a properly noticed motion pursuant to . . . § 664.6" and that in the event of disputes, "Judge Ritchie agrees to serve as the presiding judge over . . . disputes as necessary for the Parties to carry out the terms of this Agreement . . . ." Exhibit A to the Agreement, which contains the equitable relief provisions, provides that Judge "Ritchie will maintain jurisdiction over any breach or dispute related to this settlement agreement." "The retention of jurisdiction pursuant to section 664.6 is intended to allow the court to ensure all parties perform pursuant to a settlement agreement that results in a dismissal of a lawsuit. [Citation.]" (*Howeth v. Coffelt* (2017) 18 Cal.App.5th 126, 134, citing *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439.)

Since the time for the Chens to perform under the Agreement had already passed, the September Order directed them to submit a new plan that is consistent with both the Agreement and the court's orders granting an easement by September 19, ordered the HOA to respond by September 26, ordered the landscaping work to be completed by October 27, and the Chens to remove any construction debris by November 10. The court also ordered the Chens to resurvey and mark the boundary lines of the easement and set a hearing for October 10 "to address disputes that may arise" regarding the Chens' submission and the HOA's response. Given the history of the case, and the fact that the September Order required the parties to go through the approval process a fourth time, the court expected there may be additional disputes that require its supervision. The Agreement and the Orders clearly contemplate that the court will continue to supervise the settlement until the Chens' landscaping project is complete and the request for

dismissal is filed.[6] Defendants assert that because the court ordered the Chens to resurvey the easement, the September Order "contemplated entry of a more specific judgment describing the exact location of the easement's boundaries" and that further judicial action will be required to review the surveyor's work and resolve any further disputes that may arise over the location of the easement. They also contend it is very likely "future disputes between the parties will require further judicial action."

Applying the tests from *Griset*, *Critzer*, and *Sullivan*, we conclude the Orders are interlocutory because they contemplated something "further in the nature of judicial action on the part of the court" was required for "a final determination of the rights of the parties" (*Griset*, *supra*, 25 Cal.4th at pp. 698-699; *Critzer*, *supra*, 187 Cal.App.4th at p. 1251). As noted, the court ordered a further hearing to supervise its orders to ensure cooperation by the parties, prompt resolution of any further disputes, and timely completion of the landscaping project contemplated by Agreement so that the action could be dismissed. The Orders did not terminate the litigation on the merits and left much to be done (*Sullivan*, *supra*, 15 Cal.4th at p. 304). For these reasons, we conclude the Orders are interlocutory and therefore nonappealable absent an exception that authorizes an appeal.

2. Appealability as an Injunction Under Section 904.1, Subdivision (a)(6)

As noted, the Chens contend the Orders are appealable under section 904.1, subdivision (a)(6) because they in effect enjoin the Chens from completing the construction and landscaping activity contemplated by their original plan (i.e., prohibit them from installing hardscape—the proposed deck and its foundation wall, walkways, or

[6] The Agreement required the Chens to provide defense counsel with an executed request for dismissal before receiving the $150,000 payment. Since the Chens have received the payment and the case has not been dismissed, we assume they executed the request for dismissal and transmitted it to defense counsel, who has refrained from filing it until such time as the equitable relief called for in the Agreement is completed.

steps—and planting trees). They argue the Orders "are appealable because they command the Chens to perform particular acts which, if performed, will disturb the status quo and render moot any subsequent appeal." They argue these acts include "spending a lot of money on an unnecessary record of survey" and "making substantial modifications to their backyard. And all of which was in direct contravention of the terms of the settlement agreement."

Section 904.1, subdivision (a)(6) (hereafter section 904.1(a)(6)) provides that an appeal "may be taken" from "an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction." This includes any order that, although not labeled an "injunction," in effect grants or refuses to grant injunctive relief. (Eisenberg, et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2017) ¶ 2:128e, p. 2-78, citing *PV Little Italy, LLC. v. MetroWork Condominium Assn*. (2012) 210 Cal.App.4th 132 (*PV*).) "Whether a particular order constitutes an appealable injunction depends not on its title or the form of the order, but on 'the substance and effect of the adjudication.' " (*PV,* at pp. 142-143 [order requiring transfer of control of condominium association to a prior board of directors and a new election was in effect an injunction and thus appealable].) We agree that the Orders in effect grant the HOA injunctive relief by prohibiting the Chens from installing hardscape or planting trees on the easement and limiting their use of the easement to planting ground cover and bushes.

Despite the broad language of section 904.1(a)(6), case law has limited its scope. Whether an order granting or denying injunctive relief is appealable depends on whether it involves an injunction pendente lite (orders on preliminary injunctions, temporary restraining orders, and other provisional injunctions) or a permanent injunction and whether the injunctive order is interlocutory or final. The court discussed the differences between pendente lite and permanent injunctions in *Art Movers, Inc. v. NiWest, Inc*. (1992) 3 Cal.App.4th 640, 646 (*Art Movers*), stating: "In granting or denying an

injunction pendente lite, the trial court determines whether the status quo of the parties should be maintained pending the litigation or the appeal of the judgment. . . . The granting or denial of a request for a pendente lite injunction does not determine the merits of the controversy and is reviewed by an appellate court for an abuse of discretion. [Citation.]" A permanent injunction, on the other hand, "is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate. A permanent injunction is not issued to maintain the status quo but is a final judgment on the merits. [Citation.]" (*Ibid.*) The court observed that it had long been held that the predecessors to section 904.1(a)(6) "provide[d] a remedy by appeal for the grant or denial of a pendente lite injunction which is to continue in force during the pendency of the litigation and until final determination of the action" but that a number of cases had limited the applicability of the statute to "pendente lite injunctions and have refused to find interlocutory orders denying permanent injunctions to be appealable, except from a final judgment." (*Art Movers*, at pp. 646, 647.) The court held that an interlocutory order granting summary adjudication and "dismissing a cause of action for permanent injunctive relief [was] not immediately appealable" under the predecessor to section 904.1(a)(6). (*Id.* at p. 651.)

Similarly, the court in *Bishop Creek Lodge v. Scira* (2000) 82 Cal.App.4th 631, 633 (*Bishop Creek*) held that an interlocutory order *denying a permanent injunction* prior to trial of legal issues and damages is not appealable. The court held that section 904.1(a)(6) "applies exclusively to an order refusing to grant a *preliminary* injunction. An order refusing to grant a *permanent* injunction is not appealable unless and until it is embodied in a final judgment. [Citations.]" (*Ibid.*) The "rationale for this rule is not entirely clear. One court has reasoned that a preliminary injunction requires an exception to the [one] final judgment rule because it cannot be reviewed in an appeal from the final judgment. 'A plaintiff denied permanent injunctive relief, on the other hand, suffers no

immediate harm, and the denial of injunctive relief may be more easily reviewed in conjunction with the final judgment.' (*Art Movers . . ., supra,* 3 Cal.App.4th at p. 647 . . . .) A second court has reasoned that there is a nonstatutory one-final-judgment rule, which gives an appellate court discretion to refuse to hear an appeal, even from a statutorily appealable order, except when 'inflexible application of the nonstatutory rule would produce inutility or hardship.' (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 208 . . . [(*Guntert*)].) Yet a third court has held that an interlocutory order *granting* a permanent injunction is appealable because it is sufficiently final; it agreed, however, that an interlocutory order *denying* a permanent injunction should not be appealable, because the denial itself cannot be said to be final until the eventual entry of a final judgment. (*Western Electroplating Co. v. Henness* (1959) 172 Cal.App.2d 278, 282-284 . . . ; [citation].)" (*Bishop Creek*, at pp. 633-634.)

Responding to the rationale in these cases, the *Bishop Creek* court stated: "We would be reluctant to suggest that, when a permanent injunction is *granted*, the litigant who is under the burdens of the injunction cannot appeal until final judgment. Indeed, it would seem that the very permanence of the injunction should militate in favor of, rather than against, an immediate appeal. We would also be reluctant to hold that we have 'nonstatutory' discretion to disregard a statutory command. We therefore believe the appropriate rationale is that a trial court may revisit its decision to deny a permanent injunction at any time until final judgment. [Citation.] Thus, the interlocutory denial of a permanent injunction is not a sufficiently definitive 'order refusing to grant an injunction' within the meaning of . . . section 904.1, subdivision (a)(6)." (*Bishop Creek*, *supra*, 82 Cal.App.4th at p. 634; see also *Art Movers*, *supra*, 3 Cal.4th at pp. 648, 650-651 [criticizing rule from *Guntert* as imprecise and ambiguous] and Eisenberg, *supra*, ¶¶ 2:24 to 2:26 [cautioning against relying on *Guntert* rationale].)

Citing both *Art Movers* and *Bishop Creek*, Defendants argues the Orders are not appealable because they do not concern a pendente lite injunction and are instead comparable to orders for permanent injunctions. In our view, this case is distinguishable from *Bishop Creek* and *Art Movers* since it does not involve an interlocutory order *denying* a permanent injunction. Instead, the interlocutory orders here in effect *grant* the HOA permanent injunctive relief by limiting what the Chens can do on the easement.

The court discussed the appealability of an interlocutory order granting a permanent injunction in *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079 (*Daro*), stating: "Mindful that the order's proper characterization as a permanent injunction may raise a question about whether it is appealable (because it is an interlocutory order entered before a final judgment), we have satisfied ourselves that we possess jurisdiction to address the issues raised on appeal. (See *Guntert*[, *supra*,] 43 Cal.App.3d 203, 207-209 . . . [interlocutory order granting permanent injunction is appealable even though damages claims have yet to be tried].) In any event, even if there were a question about the order's appealability (see *Art Movers*, [*supra*,] 3 Cal.App.4th 640, 650-651 . . .), we would simply exercise our discretion to treat the appeal as a petition for writ of mandate and arrive at the same outcome (*Id*. at p. 651)." (*Daro*, at p. 1091, fn. 3.)

More recently, the court in *Daugherty v. City and County of San Francisco* (2018) 24 Cal.App.5th 928, 943-944 (*Daugherty*), held that the order at issue was appealable as an order granting a permanent injunction. Citing *Daro,* the *Daugherty* court added, "but even assuming there is some question about the appealability of this order, we, in all events, exercise our discretion to treat the appeal as a petition for writ of mandate. [Citations.] In our view, judicial economy would not be served by deferring resolution of this appeal pending a determination of the remaining third cause of action, as the merits of the issues on appeal have been fully briefed by the parties as well as the amici curiae. Moreover, any further proceedings in the trial court . . . , would be unlikely to improve

upon the record or briefing now presented to us for resolving the issues presented. [Citation.]" (*Id.* at p. 944.)

Following *Daro* and *Daugherty*, even if there is a question about the appealability of the Orders, we exercise our discretion to treat the appeal as a petition for writ of mandate and review the matter. This appeal has been pending for more than four years, due in part to delays in record preparation in the trial court. Judicial economy would not be served by dismissing the appeal pending further proceedings in the trial court. The process for completing the Chens' landscaping described in the Agreement and the court's orders has come to a standstill pending resolution of the appeal. Absent a further motion to enforce the settlement agreement—which could result in entry of a judgment if granted—this case will probably conclude with the filing of a dismissal since it has been settled. Once dismissed, the trial court will no longer have jurisdiction over the matter (*Viejo Bancorp*, *supra*, 217 Cal.App.3d at p. 206) and there will be nothing to appeal. Thus, the issues presented here could evade review. (See e.g., *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098 [improper appeal treated as petition for writ of mandate where issues would otherwise evade review].) As in *Daugherty*, the issues on appeal have been fully briefed and further proceedings in the trial court are unlikely to improve upon the record or the briefing. We note also that Judge Ritchie, the judicial officer specifically named in the settlement agreement, is no longer on the bench.

3. Standing to Obtain Appellate Review

Defendants contend the Chens do not have standing to appeal because the Orders are favorable to them. The Chens do not respond to this point. Generally, a party is not aggrieved by, and therefore cannot appeal, a judgment or entered in his or her favor. (*Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1611.) This rule is subject to several exceptions, which recognize that although the judgment or order is favorable to the appellant as a whole, it may in practical effect be unfavorable in part, rendering the

appellant legally "aggrieved" for appeal purposes. (Eisenberg, *supra*, ¶¶ 2:300-2:304.2, p. 2-195 to 2-196, citing *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 899 and other cases.) For example, plaintiffs can appeal from a judgment that, although rendered in their favor, awards less than the amount demanded. (Eisenberg, at ¶, 2:301, citing *Barham v. Southern California Edison Co*. (1999) 74 Cal.App.4th 744, 751, and other cases.) By analogy, while the court granted the Chens' motion to impose an equitable easement, we are satisfied that they are aggrieved by and may seek review of the portions of the Orders that limit their use of the easement. We therefore reject the contention that they lack standing to obtain appellate review.

4. Alleged Waiver of Appellate Review

Citing *Epstein v. DeDomenico* (1990) 224 Cal.App.3d 1243 (*Epstein*), Defendants argue the Chens waived their right to appellate review by voluntarily accepting the $150,000 in monetary relief provided for in the Agreement. We are not persuaded.

As the *Epstein* court explained: " 'It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. [Citations.]' (*Schubert v. Reich* (1950) 36 Cal.2d 298, 299 . . . .) The rule is based on the principle that 'the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other. [Citation.]' [Citation.] Although the acceptance must be clear, unmistakable, and unconditional [citation], acceptance of even a part of the benefit of a judgment or order will ordinarily preclude an appeal from the portion remaining. (See, e.g., *Schubert*, *supra*, at pp. 298-299 [acceptance of $ 75 attorney fee award waived right to appeal from order granting new trial].) Stated more generally, ' ". . . where an appellant is shown to have received and accepted advantages from a judgment to which [he or she] would not be entitled in the event of a reversal of the judgment . . .," ' the acceptance of even part of the judgment precludes the appeal. [Citations.] However, there is an exception to the

general rule where the appellant's right to the accepted portion of the judgment is not disputed on appeal. In that case, the appeal as to the disputed portion may proceed, because a reversal will have no effect on the appellant's right to the benefit he or she has accepted. [Citations.]" (*Epstein*, *supra*, 224 Cal.App.3d at p. 1246.)

Epstein arose out of a dispute over the sale of an apartment building. One of the defendants initiated foreclosure proceedings, and the Epsteins obtained an injunction prohibiting foreclosure and posted a $75,000 bond as security. After the case was sent out to trial, the parties settled in a judicially-supervised settlement conference. The return of the Epsteins' security deposit was one of the terms of the settlement agreement. Months after the security deposit was returned to the Epsteins, they became dissatisfied with the settlement and refused to sign a written settlement agreement. The defendants then filed a section 664.6 motion to enforce the settlement. The trial court granted the motion and entered judgment enforcing the settlement agreement. (*Epstein*, *supra*, 224 Cal.App.3d at pp. 1245-1246.) The appellate court concluded the Epsteins waived their right to appeal the judgment by accepting the return of the security deposit and dismissed the appeal. (*Id.* at p. 1248.) The court stated the recovery of the deposit was a substantial benefit of the settlement, which the Epsteins had accepted, and noted that they had been able to use that money while the case was on appeal. (*Id.* at p. 1247.) The court concluded that "the exception to waiver based on the severability of the benefit accepted does not apply" and stated "that any settlement of disputed claims involves many compromises and concessions which may not appear interdependent to those who did not participate in the discussion, but may have controlled the decision of the parties to accept other apparently unrelated terms of the agreement. For that reason, we would be reluctant to find that any term of a negotiated settlement was severable from the rest absent a clear showing of independence. There is no such showing here." (*Ibid.*)

This case is procedurally distinguishable from *Epstein* because all parties here have signed a settlement agreement. In addition, the trial court did not grant the motion to enforce the settlement agreement or enter a judgment like the court did in *Epstein*. More importantly, the Chens' right to the $150,000 monetary component of the settlement is not disputed on appeal (*Epstein*, *supra*, 224 Cal.App.3d at p. 1246) and the record supports the conclusion that the monetary and equitable relief components of the Agreement were independent of one another. The Agreement expressly distinguishes between "Monetary Relief" and "Equitable Relief" in paragraphs 1, 2, and 4. The terms of the equitable relief component are set forth in a separate exhibit to the Agreement labeled "Exhibit A" and the Agreement expressly provides that its provisions are severable in the event any provision "should be held to be void, voidable or unenforceable." The Chens' motion to impose a landscaping easement was directed solely at the equitable relief component of the agreement. Nothing in the record suggests the $150,000 was paid to compensate for damages to the Chens' yard or any existing landscaping. Indeed, while the yard and easement areas are covered with rock, soil, and construction debris and denuded of any plants, that appears to be due to the Chens' actions. In our view, the exception that permits an appeal from a severable portion of a judgment even when the appellant accepts the benefits of an unappealed portion of the judgment applies here. (*Lee v. Brown* (1976) 18 Cal.3d 110, 115.) We therefore conclude the Chens have not waived their right to appellate review by accepting the $150,000 paid under the Agreement.

For these reasons, we shall deny Defendants' motion to dismiss the appeal and review the issues presented on the merits.

C. The Trial Court Did Not Deprive the Chens of Due Process When Ruling on the Scope of the Easement

The Chens contend they should not be bound by the Orders because they were not afforded an opportunity to be heard or offer evidence in support of their contentions and were therefore denied due process. They cite *Bricker v. Superior Court* (2005) 133 Cal.App.4th 634, 638, which states: " 'It is a cardinal principle of our jurisprudence that a party should not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be duly cited to appear and afforded an opportunity to be heard and to offer evidence at such hearing in support of his [or her] contentions. [¶] . . . [¶] An order or judgment without such an opportunity is lacking in all the attributes of a judicial determination. [Citations.] [¶] Refusal to permit counsel . . . to present evidence and make a reasonable argument in support of [the] client's position [i]s not a mere error in procedure. It amount[s] to a deprival of a substantial statutory right . . . .' " (*Ibid*., quoting *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843-844.)

We review the constitutional question whether the Chens were denied due process de novo. (*State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.)

Contrary to the Chens' assertion, the record demonstrates that they were not deprived of due process with regard to the orders at issue. The Chens duly noticed the motion to impose an easement to be heard on May 2 at the same time as the Defendants' motion to enforce the Agreement. In addition to filing their notice of motion and points and authorities, the Chens attached 15 exhibits to the motion, totaling 85 pages. As for whether the easement runs with the land, the motion expressly tendered that issue, arguing that "the Chens are entitled to a landscaping easement appurtenant to their lot so that both they *and their successors in interest* will have both the right and the obligation to landscape . . . the disputed area . . . ." (Italics added.)

The Chens filed a reply brief in support of their motion, in which they asked for an "easement that will be transferable to their successors in interest." At the May 2 hearing,

the HOA's counsel questioned the scope of the easement and the court ruled on some points from the bench. After the Chens' counsel prepared their proposed order, the HOA objected to the form of the order and raised additional issues regarding the scope of the easement. Both sides sent e-mails to the court setting forth their positions on May 9. The issues identified at that time (limiting the easement to ground cover and bushes, prohibiting hardscape and trees, whether the easement runs with the land, and the eastern boundary of the easement) include the issues the Chens complain of on appeal.

After the court ruled on these points in the August Order, the Chens objected to the written order. The court set the matter for a status conference review hearing and both sides filed status conference statements. The Chens' statement contained argument about the disputed scope of the easement. The Chens asked the court to reconsider the August Order (§ 1008) and submitted evidence (12 exhibits totaling 50 pages) in support of their position. They filed a reply to the HOA's status conference statement; responded to 11 questions the court asked about the property and submitted additional argument in an e-mail on September 3; argued the matter extensively at the September 5 hearing; and submitted supplemental briefing in support of their argument, with additional exhibits. The court effectively granted the Chens' motion for reconsideration and clarified the August Order in the September Order. Contrary to the Chens' assertions, the trial court gave them multiple opportunities to present argument and evidence regarding the scope of the easement and their counsel took advantage of those opportunities. There was no deprivation of due process here.

The Chens cite Rule 3.1312, which governs the preparation and submission of orders on noticed motions. It provides that the party prevailing on the motion prepares a proposed order and transmits it to the other party for approval within five days of the ruling. The other party must advise the prevailing party within five days of service whether it approves of the order or state any grounds for disapproval. (Rule 1.1312(a).)

After the five-day period expires, the prevailing party transmits the proposed order to the court with a summary of the other party's response. (Rule 1.1312(b).) Without citation to authority, the Chens argue Rule 1.1312 does not permit additional exchanges between the court and the parties as occurred in this case. But nothing in the rule limits communication between the court and the parties over a disputed order to the contacts set forth in Rule 1.1312. And such a limitation makes little sense in a case such as this where the parties have expressly asked the court to reserve jurisdiction and resolve disputes regarding the terms of their settlement agreement.

The Chens assert that "the trial court issued the Orders based on a highly unconventional 'litigation by e-mail free-for-all' both before and after the May 2 and the September 5 . . . hearings," which "deprived [the Chens of] a proper opportunity to be heard." They contend the court sent multiple emails to the parties' counsel "demanding responses to numerous questions pertaining to issues never raised by the pleadings or the evidence submitted prior to the hearing." They argue that the Defendants "took advantage of those invitations by emailing the trial court new evidence and argument," and that the Defendants made false representations in those e-mails regarding the scope of the court's oral ruling at the May 2 hearing.

We have reviewed the e-mail exchanges between the court and the parties. We begin by noting that in each instance, when counsel e-mailed the court, the attorney sent a copy of the e-mail to opposing counsel. There were no ex parte communications here. In addition, the Chens' counsel communicated with the court via e-mail as frequently as opposing counsel did. Many of the e-mails dealt with scheduling and transmitting copies of documents the parties had filed with the court to Judge Ritchie's chambers. On May 9, the Chens' counsel sent a letter to the court pursuant to Rule 3.1312 via e-mail with the Chens' proposed order and a summary of Defendants' objections to the proposed order. The letter also responded to each of the HOA's objections with further legal argument.

The HOA's counsel sent an e-mail objecting that Rule 3.1312 does not permit the prevailing party to include additional argument in its letter to the court. She also provided the court with a copy of her letter to the Chens' counsel describing the Defendants' objections to the proposed order. After this e-mail exchange, the Chens briefed and argued their objections to the Defendants' form of order and the content of the emails at least three times: in their status conference statement, at the September 5 hearing, and in their supplemental brief. After the court received the parties' status conference statements, it sent an e-mail to both counsel, asking 11 questions regarding the property and the easement. The Chens' counsel answered the questions in an e-mail; the Defendants' counsel responded in a pleading filed with the court. In preparation for the status conference, the court sent e-mails requesting copies of the complaint, the full settlement agreement, and a map depicting the Chens' property line, which the Chens' counsel provided without objection.

Under the circumstances of this case, we see nothing inappropriate about the e-mail exchanges between the court and counsel, especially since the parties agreed in their settlement agreement that Judge Ritchie would preside over any disputes "as necessary to carry out the terms of [the] Agreement." The record reflects that the Chens had a full and fair opportunity to present their arguments about the scope of the easement on multiple occasions via e-mail, in court filings, and in oral argument before the court.

For these reasons, we conclude that the Chens' assertion that the court deprived them of due process when ruling on their motion is without merit.

D. The Trial Court Did Not Abuse its Discretion by Limiting the Scope of the Easement

The Chens argue that by limiting the use of the easement, the court exceeded the scope of the issues raised in their motion. They contend that easements are presumed to be appurtenant and therefore run with the land. They contend the court impermissibly

modified material terms of the settlement agreement and that extrinsic evidence demonstrates that the parties intended that their tiered garden be built on the easement.

1. Standard of Review

The Chens characterize the issue on appeal as whether the trial court created a material term of the settlement and argue that this case must therefore be reviewed under the substantial evidence standard. The Defendants argue that since the trial court exercised it equitable powers to fashion the easement, the Orders should be reviewed for an abuse of discretion.

The issue on appeal is not whether the trial court erred in granting the Chens a landscaping easement over HOA property. The HOA does not challenge the court's order imposing the easement and has not filed a cross-appeal. The issue is whether in granting the easement, the trial court erred by limiting the type of landscaping permitted on the easement and imposing other conditions on the Chens. Because the trial court exercised its equitable powers when fashioning the landscaping easement, we review the Orders under the abuse of discretion standard. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771 (*Hirshfield*); *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1008 (*Tashakori*).) "Our task is to decide whether [the interest granted] fell within the trial court's permissible range of options." (*Hirshfield*, at p. 771.)

As noted, the Chens argue the Orders operate as a permanent injunction, limiting the scope of their landscaping and construction on the easement. The characterization of the Orders as permanent injunctions does not alter our standard of review since we review a trial court's decision whether to grant or deny a permanent injunction under the abuse of discretion standard. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.)

"A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' (*People v.*

Carmony (2004) 33 Cal.4th 367, 377. . . .) But the court's discretion is not unlimited, ... Rather, it must be exercised within the confines of the applicable legal principles." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 [ruling excluding or admitting expert testimony].) " 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' [Citations.]" (*Ibid.*)

2. Legal Principles Regarding Equitable Easements

" 'Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men.' [Citation.]" (*Hirshfield, supra*, 91 Cal.App.4th at p. 770, citing *Estate of Lankershim* (1936) 6 Cal. 2d 568, 572-573.) "When a court exercises its equity powers, its principal concern is to promote justice, acting through its conscience and good faith." (*Hirshfield*, at p. 769.)

An easement is an interest in the land of another, which entitles the owner of the easement (the Chens) to a limited use or enjoyment of the other's land. (12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 396, p. 454.) " 'An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be *less* than the right of ownership. [Citation.]' [Citation.] Thus, '[t]he owner of an easement is not the owner of the property, but merely the possessor of a "right to use someone's land for a specified purpose . . . ." ' [Citations.]" (*Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1598 (*Blackmore*).)

"Easements may be appurtenant or in gross. An easement is appurtenant when it is attached to the land of the owner of the easement and benefits him or her as the owner or possessor of that land. [Citations.] The land to which it is attached is called the dominant tenement, and the land that bears the burden, i.e., the land of another that is

used or enjoyed, is called the servient tenement. [Citations.] [¶] An easement in gross is not attached to any particular land as dominant tenement, but belongs to a person individually." (Witkin, *supra*, at § 397, p. 456.)

3. Analysis

The Chens contend that by limiting the easement, the court exceeded the scope of the issues raised in their motion. As noted, the Chens specifically tendered the question whether the easement will run with the land in their moving and reply papers by requesting that the easement be transferable to their successors in interest. The trial court rejected that request and held that the easement would be personal to the Chens and would not run with the land. The Chens asked the court to grant them a "non-exclusive easement" that is "subject to all powers the HOA had before and will continue to have over this disputed area" and said the HOA was "going to be able to regulate what we do under our proposed easement." When arguing the motion, the HOA asked the court to define what uses would be allowed on the easement. And an easement is by definition a limited interest in the land of another. For these reasons, we reject the contention that the court exceeded the scope of the issues raised in the Chens' motion.

The Chens argue that "easements are by definition presumed to be appurtenant to, and therefore run with the land." When the language of the instrument that creates the easement is ambiguous, and it is not clear whether the easement was intended to be in gross or appurtenant to land, the law favors interpreting the easement as appurtenant. (*Elliott v. McCombs* (1941) 17 Cal.2d 23, 29.) The Chens rely on the rule that "[e]asements are presumed appurtenant unless there is clear evidence to the contrary." (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1499, fn. 3, citing *Cushman v. Davis* (1978) 80 Cal.App.3d 731, 735.) But the trial court's Orders here, which created the easement, are neither ambiguous nor unclear. The Orders provide clear evidence that the easement granted to the Chens does not run with the land and is not

intended to be transferable. The presumption of appurtenance does not mean that the court was required to grant an easement that runs with the land.

The Chens argue that neither their motion to impose an easement nor the HOA's motion to enforce the agreement discussed or briefed the permissible types of vegetation, hardscape or other features that would be permitted on the easement. The Chens contend that "[n]otwithstanding these factors, the trial court inexplicably included extraneous provision in the Orders." They specifically complain of the court's orders that they "are not allowed to build outside their property. If they chose [*sic*] to build a tiered garden it must be within their property line and shall not extend onto the easement. The landscaping on the easement is limited to ground cover and bushes. Plaintiffs cannot have trees or hardscape on the easement. The proposed landscape plan must include the Plaintiffs' property and the non-exclusive landscaping easement behind Plaintiffs' property."

As we have stated, the HOA questioned the permissible uses on the easement at the May 2 hearing and objected to the scope of the easement in response to the Chens' proposed order. The parties briefed these points further in their status conference statements, presented argument about them at the September 5 hearing, and briefed them again in their supplemental briefs. The Chens asked the court to impose an easement on HOA property. After considering the arguments on both sides, the court granted the Chens a limited right to landscape on the easement with ground cover and bushes. This is consistent with the nature of an easement as a "*restricted right* to a *specific use* or activity upon another's property." (*Blackmore*, *supra*, 150 Cal.App.4th at p. 1598, italics added.) The Chens do not provide any argument or authority that they were entitled to build a deck, plant trees, or construct planter boxes, stairways, or other structures that encroach on the common area that was owned by all of the members of the HOA. Notably, this case is distinguishable from other cases granting equitable easements that

involved the balancing of equities regarding *existing* structures on adjoining land or rights of access. (See e.g., *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1009-1015 and cases discussed therein.) This case involves the Chens' plans for prospective construction on land it turns out they do not own. The only existing structures encroaching on the easement in this case are the retaining wall, which the Agreement provides must be covered or removed, and the wooden steps and walkway, which the record suggests were intended to be temporary or replaced by other structures in the Chens' plans.

Citing legal authority that applies to motions under section 664.6 to enforce a settlement agreement, the Chens argue that the Orders "contradict and impermissibly modify express terms of the Settlement Agreement." Since the Chens opposed and the trial court denied the Defendants' motion to enforce the Agreement, the authority they cite is inapposite.

Citing section 16 of Exhibit A to the Agreement (Section 16), which provides that the Chens must seek approval from the architectural committee of the tiered garden plan they submitted in 2013, the Chens argue "[t]here can be no dispute the tiered garden plan was intended to cover the majority of the rear yard of the Property" (defined as the Chens' property). After the property was surveyed, as provided for in the Agreement, it was clear the Chens' "tiered garden plan"—over half of which is actually a large deck—is too big for the Chens' property. The Chens argue they cannot build "the tiered garden contemplated in the Settlement Agreement" unless they build it in the easement. We understand their contention to be that the Agreement included a promise by the HOA to approve the original plan they submitted in 2013. In the Agreement, all parties agreed to follow HOA rules, including the CC&R's, which prohibit construction in the common area, and the HOA's architectural rules and guidelines. Although Section 16 provides that the Chens will seek approval of the landscaping plans they submitted in 2013, it also

stated that the plans "shall provide proper identification of the plans [*sic*], ground cover, material construction specifications for any retaining wall, and elevation drawings to be reviewed by" the Committee. It provided that the Chens' full landscaping plan was to include "architectural and engineering plans," with "elevations, construction materials, and all necessary items from the [HOA's] Submittal Checklist." Section 16 provided that the committee shall consider and make a decision about the plans within 14 days and provide a written explanation of any denials. Thus, the Agreement clearly contemplated that the Committee retained its authority to withhold approval of the plans. Given the process set forth in the Agreement, we reject any contention that the Agreement included a promise that the Chens could build in accordance with the plans they submitted in 2013. Moreover, the Chens expressly asked for an easement that would be subject to HOA authority over the common area.

After the parties surveyed the property, as required by the Agreement, they discovered the Chens' property was smaller than anyone had realized. To address this problem, the Chens asked the court to grant them an easement on HOA property. The court, after considering extensive argument by both sides, fashioned a limited easement that permits the Chens to build a deck and walkways on their own land and landscape the easement with shrubs and ground cover. "The scope of an equitable easement should not be greater that is reasonably necessary to protect the [Chens'] interests. [Citations.]" (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 268.) And an "abundance of caution is warranted when imposing an easement on an unwilling landowner." (*Id.* at p. 269.) The Chens asked the trial court to exercise its equitable discretion "to fashion an equitable remedy that will serve the legitimate interests of all parties." That is what the court did. The court did not abuse its discretion in granting, but limiting, the remedy the Chens requested.

The Chens argue that in interpreting the Agreement, the trial court was required to consider extrinsic evidence of the parties' intent and that such evidence "would demonstrate that the parties intended for [the Chens] to build their tiered garden within the Easement Area, in conformity with the design going back to 2013." The Chens do not cite any legal authority or provide any citations to the record that support this contention, or describe what the extrinsic evidence might be. They have therefore failed to meet their burden on of demonstrating error on appeal.

One of the most fundamental rules of appellate review is that an appealed order is presumed to be correct. " 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956 (*Cahill*).) As appellants, the Chens have the burden of overcoming the presumption of correctness. That burden includes providing reasoned argument and citations to authority on each point raised. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 (*Niko*); *Cahill*, at p. 956.) When the appellant asserts a point but fails to support it with reasoned argument and citations to authority, the appellate court may treat it as waived or forfeited, and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why." (*Niko*, at p. 368.) We note also that Judge Ritchie supervised the five-day settlement conference; presumably she was well aware of what the parties intended when they settled the case. In addition, the Chens asked the court to deny the motion to enforce the Agreement and requested an easement remedy that was separate from the Agreement. The court did not err when it limited the equitable remedy they requested.

III. DISPOSITION

The August Order and the September Order are affirmed. Respondents shall recover their costs on appeal.

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Greenwood, P.J.

WE CONCUR:

_____
Elia, J.

_____
Danner, J.